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No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Whether the court of appeals erred in upholding the certification, pursuant to Fed.R.Civ. P.23(b)(1)(B), of a non-opt-out class settlement of millions of exposure-only asbestos victims with no current injury, because:

(1) the requirements of Rule 23(a) may not be met solely by reference to the terms of a settlement (a question also presented in *Amchem Products, Inc. v. Windsor*, No. 96-270 (argued Feb. 18, 1997));

(2) even if a settlement may sometimes be used to meet the requirements of Rule 23(a), certification was error here because of dissimilarities among class members, inherent structural conflicts within the class, the impossibility of notice to future claimants, and inadequate representation by class counsel manifested in part by their negotiation of different settlements for their individual clients outside the class from the same resources to be used to finance the class settlement (a question similar to one presented in *Amchem*);

(3) a federal court has no Art. III power to adjudicate a "case" which is brought by plaintiffs who do not in good faith plead claims they intend to litigate, and which is brought as a friendly joint venture with the defendants solely to provide a jurisdictional hook for a federal court to impose upon a nationwide class a tort reform proposal displacing state law (a question also presented in *Amchem*);

(4) due process requires that absent class members (including residents of the State where the action is brought) be given the chance to opt out of any class action purporting to bind them with respect to *in personam* claims for money damages (a question also presented in *Adams v. Robertson*, No. 95-1873 (dismissed as improvidently granted, March 3, 1997));

(5) due process prohibits a court from exercising personal jurisdiction over class members asserting claims for damages who lack minimum contacts with the forum State, unless they have an opportunity to opt out (a question also presented in *Adams*);

(6) under the Rules Enabling Act, Rules of Decision Act, and principles of federalism, Fed.R.Civ.P. 23(b)(1)(B) may not, where the "limited fund" is contrived by a settlement between the parties, be used to deprive unidentifiable and unknowing "future" claimants of their right to pursue their own *in personam* damage claims when they arise.

PARTIES TO THE PROCEEDING

The petitioners in this case are Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood and Henry Evers. The defendant is Fibreboard Corporation. The plaintiff class representatives are Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison, James Drake, and Juanita Drake. The insurers who intervened below are Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, and Pacific Indemnity Company. The other parties are Roland Dearborn; Judith Dearborn; Kerwin Butcher, Director, Office of Workers' Compensation Programs, U.S. Department of Labor; James Flanagan; David Middleton; Owens-Illinois, Inc.; Bethlehem Steel Corporation; Kenneth Smith; Plant Insulation Company; and Safety National Casualty Corporation.

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JURISDICTION

The judgment of the court of appeals (App. 64a) was entered on July 26, 1996, and a timely petition for rehearing was denied on December 3, 1996. App. 523a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

Pertinent portions of Article III of the U.S. Constitution, the Due Process Clause of the 5th Amendment, the Rules Enabling Act, 28 U.S.C. § 2072, the Rules of Decision Act, 28 U.S.C. § 1652, and Fed.R.Civ.P. 23 are set forth in Appendix M at pages 525a-527a.

STATEMENT OF THE CASE

Like *Amchem Products, Inc. v. Windsor*, No. 96-270 (argued February 18, 1997), this case involves a nationwide class action settlement that resolves the unaccrued personal injury claims of millions of presently uninjured people who have been exposed to asbestos. Although this case raises several issues that are not presented in *Amchem*, the two cases present identical questions as to the limits of an Article III court's subject-matter jurisdiction to approve a privately negotiated tort reform proposal, and as to whether the criteria of Rule 23 are satisfied, for what would otherwise be an uncertifiable class, simply because the case has already been settled.

Moreover, this case also presents the question whether due process requires that all class members — including (but not limited

to) non-residents of the state where the action is brought — be permitted to exclude themselves from any class action purporting to resolve their *in personam* claims for damages. The Court issued a writ of certiorari to consider this question in *Adams v. Robertson*, No. 95-1873 (writ dismissed as improvidently granted, March 3, 1997), but was unable to reach the merits of the issue in light of a procedural default. The Court went out of its way in *Adams* to note its "continuing interest in [this] issue," slip op. at 8 n. 6, and — unlike *Adams* — this case presents the question squarely.

In addition to its overlap with *Amchem* and *Adams*, this case is independently worthy of review because it is the first-ever certification of a mandatory, future-claimant, settlement-only class action. The aggregate effect of the settlement's multiple restrictions on asbestos victims' due process rights, on top of the Fifth Circuit's refusal to recognize the proper limitations of federal judicial power, amplifies the importance of this case. Indeed, recognizing both that the case is extraordinarily important and that the panel's decision was questionable, a majority of the Fifth Circuit judges that considered the suggestion for rehearing en banc voted to rehear the case.

The Fifth Circuit denied rehearing en banc only by a quirk of its local rules. Five of the seventeen active Fifth Circuit judges were recused, and another declined to participate in the en banc poll. App. 519a-522a. Although the participating judges favored rehearing by a majority of six to five, Fifth Circuit Rule 35.6 provides that active judges who are disqualified or recused nonetheless are counted for purposes of determining the majority required to grant en banc rehearing. *See* 28 U.S.C. § 46(c). Had the same vote occurred in, for example, the Second, Seventh, or Tenth Circuits, rehearing en banc would have been granted. *See* Second Circuit Rule 35; Seventh Circuit IOP 5(d)(1); Tenth Circuit Rule 35.5.

In view of the importance of the issues raised and their overlap with pending cases, this Court should grant plenary review or, at the very least, hold this petition in abeyance pending the decision in *Amchem*.

1. Background and Settlement Negotiations. Fibreboard's corporate predecessors manufactured and distributed asbestos-containing products from the 1920s until 1971. By 1988, Fibreboard had exhausted substantially all of its insurance resources available to

defend and indemnify asbestos lawsuits, with the exception of contested coverage arising out of policies issued by Continental Casualty Co. ("CNA") and Pacific Indemnity ("Pacific") for the years 1957 through 1959. While both insurers disputed any coverage for Fibreboard's current and future asbestos liabilities, their potential exposure was unlimited, as none of the contested policies had an aggregate limit on coverage. The coverage dispute has been the subject of litigation between Fibreboard and the Insurers in the California state courts since 1985.[1]

This proceeding began as an insurance coverage dispute among Fibreboard, Pacific, and CNA. No "plaintiff" or "claimant" who had been injured by asbestos products came forward to file a class action complaint with the district court. Rather, the case began when Fibreboard, possessing (a) $225 million in net worth which it wished to protect and (b) the possibility of unlimited insurance coverage in the future, established a "corporate goal" of "manag[ing] and resolv[ing] its asbestos liabilities within its available insurance resources." App. 552a-553a. In 1991, Fibreboard sought out several nationally prominent asbestos plaintiffs' attorneys – Harry Wartnick, Steven Kazan, Joseph Rice, and Ron Motley[2] – and invited them to negotiate a "global" solution to Fibreboard's total potential future asbestos liabilities. Those plaintiffs' attorneys agreed to commence negotiations, which originally contemplated an assignment of Fibreboard's disputed insurance coverage to present and future

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[1] In 1996 the California courts finally resolved the bulk of the contested coverage issues in favor of Fibreboard. *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal.App. 4th 1, 52 Cal.Rptr. 2d 690 (Cal.Ct.App. 1996), *review denied* (Aug. 21, 1996). Since that decision, the Fifth Circuit has mooted the coverage litigation altogether by affirming the district court's approval of the "Trilateral Settlement Agreement" in the case of *Continental Casualty Co. v. Rudd*. App. 58a-64a. As described below, the Trilateral Agreement compromises Fibreboard's coverage dispute independently of the class settlement in this case.

[2] In May 1992, Joseph Cox, a partner at the Ness Motley firm, replaced Mr. Motley. This petition will refer to Messrs. Cox, Rice, Wartnick, and Kazan as "class counsel."

asbestos claimants, along with some additional consideration from Fibreboard to settle certain claims for which no insurance existed.

In March 1993, CNA began participating in global negotiations with class counsel and Fibreboard to resolve both its coverage dispute and Fibreboard's present and future asbestos liabilities. On August 9, 1993, Pacific came to the negotiating table. By Order of August 9, 1993, the Hon. Robert M. Parker, then Chief Judge of the Eastern District of Texas,[3] purported "to authorize the following attorneys [Messrs. Rice, Cox, Kazan, and Wartnick] to negotiate with Defendant the prospect of a Rule 23(b)(1)(B) settlement class composed of future claims against Fibreboard." App. 11a. Thus, before a lawsuit had even been filed and assigned to Judge Parker's court, Judge Parker purported to "appoint" counsel to negotiate a settlement with the defendant, ostensibly on behalf of unnamed (and unknown) plaintiffs to be named later. Judge Parker participated intensively in the settlement negotiations. App. 11a-13a. The critical settlement discussions that produced the final agreement were held at Judge Parker's home, ostensibly because the courthouse was closed for the day and because the parties wished to reach agreement before an oral argument in the California Court of Appeals in the insurance coverage case on August 27, 1993. *Id.*

On August 27, 1993, the settling parties announced their proposed Global Settlement of future asbestos claims. That same day, the insurers and Fibreboard independently agreed to resolve their insurance coverage dispute with respect to *all* claims, both present and future, whether or not the Global Settlement of future asbestos claims received court approval. This independent Trilateral Agreement, formalized on October 12, 1993, provides that, if the Global Settlement is not ultimately approved, the insurers will pay Fibreboard $2 billion, which Fibreboard can then use — in addition to its own assets — to resolve "future" and unsettled "present" claims as such suits are filed in the years to come. Unlike the Global Settlement, the Trilateral Agreement in no way limits the legal rights of asbestos victims with respect to their claims against Fibreboard. As a result of the Trilateral Agreement, there exists no threat that

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[3] After the class action complaint was filed, Judge Parker became a judge of the Fifth Circuit; he continued to sit as district judge in this case by designation.

Fibreboard might have no insurance coverage with which to pay future asbestos claims.[4]

On September 9, 1993, the settling parties filed the complaint in *Ahearn v. Fibreboard Corp.*, No. 6:93cv526 (E.D. Tex. 1993), the class action lawsuit they had "settled" two weeks earlier. App. 528a. The complaint alleged claims on behalf of all those who have been exposed to asbestos for which Fibreboard may be liable, but who had not filed, or had dismissed without prejudice, an asbestos-related lawsuit against Fibreboard prior to August 27, 1993, and all past, present, and future spouses, parents, children, and other relatives of such individuals. *Id.* at 4. While the complaint sought damages for the proposed class only against Fibreboard, CNA and Pacific immediately intervened as defendants. App. 14a; 543a.

At the same time they filed their complaint, class counsel and the insurers jointly moved for certification of a mandatory, nationwide class under Fed.R.Civ.P. 23(b)(1)(B) — whether or not the class members currently had an actionable asbestos-related condition. In other words, potential asbestos plaintiffs were included in the proposed class even if they had not yet sustained physical injury, had no accrued claims, and were protected by state laws from the running of statutes of limitations on any claims they might develop in the future, while currently injured asbestos plaintiffs who had already sued were simply defined as being outside of the class and were thereby automatically opted out of this non-opt-out class.

For those few putative class members who had already developed an asbestos-related disease, the complaint sought damages for personal injuries. For all other class members — the overwhelming majority — who had been exposed to asbestos but had not yet developed any discernible physical injury as a result, the

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[4] The insurers filed suit against a defendant class of "future" asbestos claimants (*Continental Casualty Co. v. Rudd*), seeking a declaration that the Trilateral Agreement was fair and reasonable with respect to the defendant class members, who are the potential third-party beneficiaries of the policies. The district court approved the Trilateral Agreement; petitioners neither objected to that agreement nor appealed from the district court's judgment. Although the Fifth Circuit consolidated *Rudd* with this case, following issuance of the panel's decision in the two cases *Rudd* was severed. No party sought rehearing of the *Rudd* decision and the *Rudd* judgment is now final.

complaint purported to seek damages for their increased risk of contracting asbestos-related diseases in the future, for emotional distress arising from the fear of contracting future diseases, and for medical monitoring to detect those diseases. App. 537a.

On the same day that the complaint and joint motion for class certification were filed, Judge Parker provisionally certified the class "for settlement purposes only" under the so-called "limited fund" provision of Fed.R.Civ.P. 23(b)(1)(B). App. 515a. This "provisional" certification occurred at an irregular meeting held in New Orleans, outside Judge Parker's judicial district in Texas, on September 9, 1993. There had been no notice to any absent member of the class of this impromptu proceeding. There was no opportunity for objectors to participate. At that September 9 "hearing" in New Orleans, Judge Parker purported to designate counsel for one of the defendants as "a deputy district clerk for the Eastern District of Texas" and entrusted him with the original copies of Judge Parker's orders for filing with the Clerk of the Eastern District Court back in Texas. App. 598a-600a. Also on September 9, 1993, the district court appointed as class counsel the four asbestos plaintiffs' attorneys who had negotiated the settlement announced on August 27. App. 14a. Three months later, on December 23, 1993, the settling parties filed the written settlement document formalizing the provisions of the agreement they had reached in August. App. 14a-15a.

2. The terms of the global class settlement. Although the class complaint of course alleged no unaccrued claims for future personal injuries, the central feature of the Global Settlement is that all class members *release* those claims. The settlement provides that CNA and Pacific will contribute $1.525 billion to a Trust to be established on behalf of all class members, and Fibreboard is to contribute only an additional $10 million (out of its net worth of at least $225 million). In return, Fibreboard is forever released from any lawsuit that class members might bring in the future, and the insurers are released from any responsibility for defending against or indemnifying such claims. App. 16a.

This release of unripe future claims provides the means for Fibreboard to achieve its "corporate goal" (App. 553a) of resolving its asbestos liabilities within the limits of its available insurance resources. This surrender of future claimants' rights also allows the

insurers to achieve total peace with respect to all potential claims for which they might be responsible. Because the class was certified as a mandatory class under Rule 23(b)(1)(B), class members were given no opportunity to exclude themselves from this compulsory release of their as-yet unaccrued claims. The Global Settlement extinguishes class members' claims even if they received no notice of the settlement and hence were unable to object to it in a timely manner, even if they were unaware of their own exposure to asbestos or of the past exposure of whoever was to become their parent or spouse, and even though only a tiny percentage of the class members have yet suffered any injury from their exposure.

In return for this forced release of all future, unaccrued claims, class members are allowed the opportunity, if and when they develop an asbestos-related disease, to present a claim against the Trust established under the Global Settlement. Once a class member submits a complete claim and furnishes all necessary information to support that claim, the Trust will make an offer of settlement after completing an initial evaluation of the claim. App. 564a. If the class member accepts such an offer, she will be paid in three annual installments – 40 percent in the first fiscal year after the offer has been accepted, and 30 percent in each of the following two years. App. 581a-582a. If the class member rejects the offer, she may then proceed to mediation, non-binding arbitration, and finally a mandatory settlement conference.

Only after enduring all of these delays may a class member finally file a lawsuit against the Trust, but the Global Settlement imposes significant limitations on that lawsuit. Class members cannot recover punitive damages, prejudgment interest, or post-judgment interest. App. 560a. They are limited to a maximum of $500,000 in compensatory damages, no matter how much damage is assessed by the jury. App. 583a. Even in jurisdictions that provide for joint and several liability, they are limited to the portion of liability assigned to the Trust, which stands in the shoes of Fibreboard for purposes of trial. App. 560a. If the class member ultimately prevails, the Trust is allowed to pay the class member's judgment in installments over a period of five to ten years. App. 312a; 582a.

3. District Court Proceedings. The five petitioners are all members of the plaintiff class who intervened in the district court for

purposes of objecting to the proposed Global Settlement. The district court held a hearing regarding the fairness of the proposed class settlement but did not conduct a hearing on class certification.

On July 27, 1995, the district court certified the class pursuant to Rule 23(b)(1)(B) and granted final approval of the settlement. The court overruled all objections to the Global Settlement, and issued a Memorandum Opinion, Findings of Fact, and Conclusions of Law. In addition to approving the settlement, the district court awarded the plaintiff class counsel chosen by Fibreboard a total of $43.7 million in fees. App. 512a-514a.

4. The Court of Appeals' Decision. A divided panel of the Fifth Circuit affirmed, over the strenuous and comprehensive dissent of Circuit Judge Jerry Smith. The majority expressly declined to follow the Third Circuit's decision in *Georgine v. Amchem Products* concerning the role of a settlement in a district court's class certification decision. App. 21a-22a. Instead, the panel held that the settlement was sufficient to satisfy the commonality and typicality requirements of Rule 23(a) and asserted that "significant differences" among individual class members "do not affect the settlement in the least." App. 23a-24a. Moreover, the majority also concluded that Rule 23, due process and Article III did not bar the release of class members' future claims, because "the settlement . . . does not purport to make any determination of the validity or amount of individual personal injury claims against Fibreboard." App. 50a-51a.

Petitioners argued that class counsel should not have represented individual asbestos claimants with present injuries and claims at the same time they were negotiating on behalf of a class of future claimants, because the interests of those two groups conflict over how any settlement should allocate and limit recovery. Ignoring Fibreboard's claim — and the court's own determination — that Fibreboard's assets constitute a so-called "limited fund" within the meaning of Rule 23(b)(1)(B), the Fifth Circuit majority concluded that, although

> Counsel certainly knew in a general way that there was a sum beyond which Continental would not pay[,] ... because they did not know that limit, they did not know that this limit would be less than an amount they were willing to accept in settlement for both classes of claimants.

App.31a-32a. Even the settling parties' expert admitted, however, that the insurers' ceiling price might not be high enough to satisfy both present and future claimants fairly. 5th Cir. Joint Appendix, Vol. VII, at 2383-84.

The Fifth Circuit also upheld the district court's certification of a mandatory class under Rule 23(b)(1)(B) with respect to the class members' *in personam* claims for damages. The court of appeals held Rule 23(b)(1)(B) applicable because the theoretical possibility of future insolvency created a "'risk' that separate adjudications 'as a practical matter' would 'substantially impair or impede' the interests of the class." App. 43a. The court also rejected petitioners' contention that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), requires that all class members be afforded an opportunity to exclude themselves from this class purporting to bind them with respect to their claims for money damages. The Fifth Circuit majority held that *Shutts* did not apply because the theoretical risk of Fibreboard's future insolvency transformed the action from one seeking classwide disposition of individual monetary claims for *in personam* tort damages into a "unitary," "*in rem*" claim for equitable allocation of a limited fund. App. 49a-50a.[5] Although petitioners argued that the Rules Enabling Act and related principles of federalism prohibited the district court's *pro rata* adjustment of the class members' substantive state law rights through certification of a mandatory class resolving claims for *in personam* damages, the court failed even to acknowledge that issue.

Finally, the court of appeals brushed aside petitioners' arguments that the district court lacked subject-matter jurisdiction to approve this settlement of unaccrued, future damages claims. The majority declined to rebut Judge Smith's extended analysis that the "exposure-only" class members lacked standing. App. 119a-146a. However, the

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[5] The court also rejected petitioners' narrower, alternative contention that due process at least requires that class members who lack minimum contacts with the forum state of Texas be given an opportunity to opt out, so that their failure to do so might be construed as consent to the court's exercise of personal jurisdiction. App. 46a-48a. *See Shutts*, 472 U.S. at 812. Petitioners Allgood, Evers and Taylor are Alabama residents who lack even minimum contacts with Texas.

panel majority expressly rejected petitioners' contention that the action was a "feigned" case that failed to meet Article III's "case or controversy" requirement. App. 52a-54a.

In a lengthy dissenting opinion, Judge Smith chastised the majority for "refus[ing] to reverse — or veto — certification of this no-opt-out, mass-tort, settlement-only, futures-only class action." App 148a. Judge Smith observed that "[o]ur sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here." App. 73a. His critique emphasized both the majority's failure to protect the due process rights of absent class members and its failure to recognize that the federal judicial power is limited to the adjudication of adversarial lawsuits. App. 68a. Judge Smith explained that:

> The district court legislated a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit. Of course there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they had already settled it.

App. 70a. The bulk of the settlement, moreover, "is purely legislative: Class members' causes of actions are repealed in favor of the equivalent of a workers' compensation regime." App. 71a. Judge Smith commented that "the victims" — the absent class members — "were the only entity absent from the bargaining table. Perhaps for that reason, they also were the only losers." App. 66a. They were compelled to trade away Fibreboard's liability for nothing to which they did not already have a right. App. 65a. Meanwhile, "Fibreboard's stock soared" after the settlement was announced. App. 77a.

Judge Smith detailed the due process, federalism, Rule 23, Article III, and other fundamental problems with the district court's decision. He also raised grave questions about Judge Parker's leading role in creating this class action: "[i]n the end, [Judge Parker] appears to have become too close to both the overall problem and the instant settlement to act in a judicial capacity in this case." App. 66a. And, emphasizing that the settlement here presents a "new animal," Smith decried the majority's assertion that the "unique facts" of the case justify evisceration of class members' due process rights.

Rather, those "novel facts may actually call for *enhanced*, not lessened, protections for vulnerable asbestos victims." App. 80a-81a (emphasis in original).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS ISSUES RAISED IN *AMCHEM PRODUCTS V. WINDSOR.*

Many of the legal issues raised in this case have already been presented to this Court in *Amchem Products, Inc. v. Windsor*, No. 96-270 (argued February 18, 1997). Like that case, this action involves the extraordinary application of Fed.R.Civ.P. 23 to a settlement class action brought to resolve the unaccrued future personal injury claims of millions of people who have been exposed to asbestos.

A. The Court Below, Like The District Court In *Amchem*, Erred By Predicating Class Certification Entirely On The Existence Of A Settlement.

By its terms, Rule 23 permits judicial resolution of the rights of persons not before the court only when the prerequisites of commonality, typicality, and adequacy of representation have been met, *in addition to* the other safeguards of Rule 23, such as the 23(e) requirement of judicial approval of any settlement. But in determining whether this class action meets both the commonality and typicality criteria, the Fifth Circuit ignored class members' actual legal claims and instead wholly relied on the settlement.

Here, as in *Amchem*, the lower courts' ruling that the class met the Rule 23(a) requirements of commonality and typicality was premised on the class members' general common "interest" in maximizing compensation from the proposed settlement. App. 22a-24a & n. 8; App. 191a-192a; *Amchem* Cert.Pet.App. 226a-227a. Indeed, in reaching this holding on Rule 23(a), the district court below relied expressly upon the district court decision in *Amchem*. App. 191a (citing *Georgine v. Amchem Products*). And the Fifth Circuit panel acknowledged that all of the common "issues" it

identified as satisfying Rule 23(a)(2) "are derived from the settlement rather than from the *Ahearn* complaint." App. 23a. Likewise, the court concluded that 23(a)(3)(typicality) was met because the class representatives have settlement-derived "interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation" that are typical of all class members. App. 23a.

Thus here, as in *Amchem*, the "vice" is that the "settlement is being used as a sufficient basis in and of itself to answer ... these various preceding conditions for class certification." Tr. Oral Arg. in No. 96-270 (Feb. 19, 1997) at 17 (Souter, J.). A class action that concededly cannot be certified without settlement is, by definition, a class action that cannot be certified without the defendant's consent. To read Rule 23 as permitting class actions of this sort is to do much more than eliminate the leverage plaintiffs normally have in settlement negotiations — the leverage that comes from being able to threaten to take the defendant to court if it refuses to settle. Reading Rule 23 to permit class actions in which defendant has unilateral power to prevent class certification — i.e., to prevent the case from being adjudicated — entails giving the defendant enormous power over absent class members to whom the defendant owes no fiduciary duty whatsoever. This would create what amounts to an agency relationship between the defendant and the absent class plaintiffs that not only (1) trenches on the law of whatever state supplies the causes of action that are thereby put into the hands of the adversary, thus contravening the Rules Enabling Act, 28 U.S.C. § 2072(b), but also (2) violates the due process principles recognized in *Hansberry v. Lee*, 311 U.S. 32, 41-45 (1940). *See Richards v. Jefferson County*, 116 S.Ct. 1761, 1764, 1767-68 (1996).

Under the Fifth Circuit's interpretation of Rule 23, literally anyone can be a common, typical, and adequate representative of any random group of people, so long as that person negotiates a class settlement on behalf of that group. Once the negotiation has been completed, the class certification inquiry is satisfied by the settlement itself: even though the group may not have held legal "claims or defenses," Rule 23(a)(3) — or anything else — in common *before* the negotiation, once a settlement is achieved, they all have common interests in benefitting from the settlement. Assuming that the

settlement then survives the court's fairness inquiry under Rule 23(e), the Rule has been satisfied and the settlement is binding.

This cannot be the law. Under the text and structure of Rule 23, each of the provisions of subdivisions (a) and (b) is an independent requirement that must be satisfied, quite apart from the additional barrier created by Rule 23(e), which prohibits settlement without court approval. Rule 23's requirements are cumulative, not alternative. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). The requirements of Rule 23(a) are necessary to ensure that the virtual representation of an absent class remains consistent with due process. A district court's after-the-fact "fairness" review was never meant to substitute for the multiple structural protections built into Rule 23. The most fundamental principles underlying class actions limit the powers of the class representatives to the claims they possess in common with other members of the class. *See Matsushita Elec. Indus. Co. v. Epstein*, 116 S.Ct. 873, 888-90 (1996)(Ginsburg, J., joined by Stevens and Souter, JJ., concurring). This restriction is rooted in the basic rationale underlying the adequacy of representation requirement: "the court must be satisfied that the class representative, by litigating his or her personal claim, will also necessarily be litigating common claims that are shared by the class." 1 Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 1.13 at 1-36 (3d ed. 1992).

The decision below thus flouts the very requirements of Rule 23(a) that this Court has rigorously enforced as the *sine qua non* of due process in cases of virtual representation. *See, e.g., General Tel.Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982) (Mexican-American employee who was denied a workplace *promotion* was not typical of a class of Mexican-American job *applicants*); *East Texas Motor Freight System, inc. v. Rodriguez*, 431 U.S. 395, 403-05 (1977) (concluding, on basis of survey of record, that named plaintiffs could not meet adequacy of representation requirement of Rule 23(a)); *Hansberry v. Lee*, 311 U.S. 32, 40, 44 (1940) (upholding collateral challenge on grounds of inadequate representation and explaining that stipulation of parties in prior litigation that 95 percent of owners had signed covenant — which was contrary to fact — could not be binding on court); *see also Richards v. Jefferson County*, 116 S.Ct. 1761, 1766-68 (1996)

(holding that prior litigation to challenge constitutionality of county's occupation tax could not bind different taxpayers who received no notice or adequate representation in prior suit, and rejecting Alabama Supreme Court's purported finding that representation was adequate).

The abrogation of Rule 23(a)'s protections in the settlement context is even more troubling where, as here, (1) the case was settled before there were any representative plaintiffs, (2) the settlement releases *future* claims for which no representative could *ever* be considered typical, and (3) class membership is mandatory. Indeed, this class could not have been certified even under the Fifth Circuit's erroneous theory that a settlement can be used to substitute for the Rule 23(a) class requirements.

First, the typicality requirement could not possibly be met in this nationwide class of everyone who might someday be injured by exposure to Fibreboard's asbestos. The class is "a hodgepodge of factually as well as legally different plaintiffs." *Amchem* Cert.Pet.App. 53a. The settlement only makes this fatal lack of typicality more obvious:

> The settlement's prohibition on punitive damages affects plaintiffs from different states differently; its caps on individual recovery discriminate against the most seriously injured class members; and its spendthrift provisions alter the distribution of funds between extant and latent claimants.

App. 101a-102a (Smith, J., dissenting).

Second, as just demonstrated, the settlement does nothing to cure the lack of adequate representation that inevitably flows from mass resolution of such divergent and antagonistic interests. As in *Amchem*, the class in this case was plagued by an inherent, structural intra-class conflict between presently injured and exposure-only class members. App. 110a-113a (Smith J., dissenting); *Amchem* Cert.Pet.App. 49a ("the most salient conflict in this class action is between the presently injured and futures plaintiffs"). Furthermore, as Judge Smith explained at length, class counsel and their current inventory of clients had huge financial interests in conflict with the members of this class action. App. 107a.

Third, these fatal defects in virtual representation of the absent class were compounded here, as in *Amchem*, by the inherent due process problem in providing any type of meaningful notice to unidentified, unknowing, future tort claimants. Many class members are unaware of their own exposure to asbestos, and others are unaware of the exposure of a spouse or family member. In any event, no class member can meaningfully assess *today* whether the settlement will be in his best interests at such future time as an asbestos-related injury may occur. In the context of a mandatory settlement class, due process requires that class members have an opportunity to make an informed decision whether to oppose or acquiesce in the class settlement.[6] Here, where class members' claims have not yet accrued, such an informed decision is not possible.

B. Like *Amchem*, This Class Action Is Not A Justiciable Controversy Under Article III.

This case, like *Amchem*, raises fundamental questions regarding the propriety of an Article III court's assertion of jurisdiction over a "class action" that the parties admit they never intended to litigate, solely to stamp its approval upon a nationwide settlement permanently releasing unripe, future claims. The Fifth Circuit's decision endorses the use of federal judicial power to enact a prospective change in the substantive state law rights of unconsenting, unknowing, potential future tort claimants. As Judge Smith explained in detail, "[t]his case shatters the constitutional limits placed on the authority of the federal courts by Article III"(App. 120a):

> When we depart from that role [of resolving cases and controversies] by considering generalized grievances or private dispute resolution mechanisms, we quickly find

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[6] Notice was vital (and compelled by Rule 23(c)(2)) in *Amchem* in order that class members be afforded a meaningful opportunity to evaluate the proposed settlement and exercise their rights under Rule 23(b)(3) to opt out of the class. Here, notice was equally vital (and compelled by Rule 23(e)) in order that class members be afforded a meaningful opportunity to evaluate the proposed settlement and decide whether to object to it.

ourselves acting more as legislative policymakers than as judges.

This Court has found "unfit for adjudication" any cause that "'is not in any real sense adversary,' that 'does not assume the honest and actual antagonistic assertion of rights,'" and which therefore violates "a safeguard essential to the integrity of the judicial process." *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (quoting *United States v. Johnson*, 319 U.S. 302, 305 (1943)). Here, even a cursory look beyond the pleadings reveals that this "lawsuit" is a charade. The class complaint, the document upon which the district court's jurisdiction must be premised, was no more than a contrivance to ripen prematurely claims that will exist, if at all, only at some unknown time in the future. Just as in *Amchem*, the filing of the complaint was choreographed by the settling parties solely as part of their joint effort to foist their negotiated tort reform proposal upon the class. Article III jurisdiction may not rest upon such a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 181 (1905); *Cleveland v. Chamberlain*, 66 U.S. 419, 425-26 (1861).

The panel below admitted that "clearly [the plaintiff class] did not intend to litigate the complaint," but held that the district court could nonetheless assert jurisdiction to approve the settlement because of "the adversarial nature of the disputes which the settlement resolves."App.52a. But tough "negotiations" are commonplace both in private contractual dealings and in the legislative process, so they can hardly distinguish those processes from *adjudication* — the *sole* province of an Article III court. How much struggle took place *before* the pleadings were submitted to the district court — that is, before a lawsuit existed even in name — proves nothing about the existence of a justiciable controversy *in that court*.

Moreover, the disputes that fueled the class settlement negotiations — primarily, the amount of money Fibreboard's insurers would pay to resolve their coverage dispute — are *not* the disputes embodied in the sham allegations of the class complaint. The complaint alleges individual, *in personam* personal injury claims *against Fibreboard*, but the settlement negotiations focused on the

aggregate amount of potential liability the *insurers* could face, and the merits of their policy defenses.[7] The latter disputes were between Fibreboard and the insurers, and the interests of the class with respect to them were aligned with those of Fibreboard. The class did not and could not stand in Fibreboard's shoes to allege coverage claims against the insurers. In any event, alleging those coverage claims on Fibreboard's behalf would not have given the class representatives authority to release absentees' separate personal injury claims *against* Fibreboard. *See National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981)(Friendly, J.).[8]

In short, this "case" is a legislative joint venture, not an adversarial lawsuit. A federal court's only constitutionally permissible option when such circumstances appear is to dismiss the action for lack of subject-matter jurisdiction. *See United States v. Johnson*, 319 U.S. 302 (1943); *Moore v. Charlotte-Mecklenburg Bd.*

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[7] Here, as in *Amchem*, the class settlement does not itself redress the claims pleaded by the exposure-only class representatives in the complaint. App. 70a. Indeed, as Judge Smith explained in great detail (App. 119a-146a), there is serious question whether the exposure-only plaintiffs in this diversity suit can show "an invasion of a legally protected interest," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), sufficient to confer standing, because many states' substantive law affords no cause of action to protect against mere exposure to a toxin. This Court has unanimously held that the question of whether the plaintiff has a "legally protected interest," and hence standing, is "'a question of substantive law, answerable by reference to'" the rule of law "'whose protection is invoked.'" *Int'l Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Therefore, "when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action." App. 143a (Smith, J., dissenting). "Any claims not authorized by state law should have been explicitly excised" from the class complaint in this case because the district court lacked jurisdiction over them under Art. III. App. 145a.

[8] Given that the "exposure only" class members never intended to pursue the claims alleged, they have no "injury in fact" sufficient to support Article III standing. Here, as in *Amchem*, Article III's requirement of actual or imminent injury "has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time." *Lujan*, 504 U.S. at 564 n.2. *See* Cert.Pet.App. in *Amchem*, No. 96-270, at 60a-61a, 66a.

of Educ., 402 U.S. 47 (1971); *Muskrat v. United States*, 219 U.S. 346 (1911); *Chicago & G.T. Ry. v. Wellman*, 143 U.S. 339 (1892).

II. THIS CASE PRESENTS ISSUES RAISED IN *ADAMS V. ROBERTSON.*

This case also presents two due process issues that were before this Court, but which were not decided, in *Adams v. Robertson*, No. 95-1873 (certiorari dismissed as improvidently granted, March 3, 1997). The first issue is whether due process requires that all absent class members (including residents of the state where the action is brought) be given the opportunity to exclude themselves from any class action purporting to bind them with respect to their *in personam* claims for damages. In class actions seeking to bind plaintiffs with respect to claims seeking predominantly money damages, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). This is the issue that this Court granted certiorari to review in *Adams*. *Adams v. Robertson*, slip op. at 1.

The petitioners here are objectors to the class settlement who contend that the settling parties and the lower courts erred in relying on the settlement to recast claims for individual damages as claims for equitable relief that qualify for mandatory class treatment. Unlike *Adams*, here there is no issue of procedural default. *See* pp. 8-9, *supra*. In the instant case, the Fifth Circuit rejected petitioners' constitutional objections to the mandatory nature of this class action on the grounds that class members were not seeking damages, but instead sought equitable redistribution of a common fund. App.47a-48a. Yet, as Judge Smith pointed out, the panel majority expressly conceded that the complaint itself belies this characterization, because the "'central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages.'" App. 122a (quoting the panel majority). Furthermore, the district court "actually stated that '[the] claims were, prior to the settlement, in personam in character.'" App. 122a n. 56 (quoting the district court).

Unlike litigants bringing *in rem* actions for the accounting of a trust or for interpleader, class members here did not assert claims against any specific property or common fund. Nor were class members' claims pleaded against a defendant in receivership or bankruptcy. *Cf. In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992)(upholding mandatory class action seeking equitable redistribution of commonly held property in form of a bankruptcy trust, but recognizing that *Shutts* would forbid mandatory class treatment if members of plaintiff class were not all beneficiaries of the trust). As the panel majority admitted, this case "presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims." App. 42a. In contrast to *in rem* cases, where Rule 23(b)(1)(B) might appropriately and constitutionally be applied, in this case the class complaint asserted *in personam* claims for personal injury damages against a solvent defendant that merely faced a theoretical risk of insolvency — as does *any* company — dependent on the outcome of its insurance coverage dispute and future tort claims against it. Fibreboard's arrangement with its insurers can no more alter the status of this proceeding under Rule 23 than California's decision to "buy insurance to protect itself against potential tort liability" could alter its status under the 11th Amendment in *Regents of Univ. of Calif. v. Doe*, No. 95-1694 (February 19, 1997), 1997 U.S. Lexis 1268 at *11. The fact that a *legislature* may possess the sovereign power drastically to alter (or even eliminate) a party's right of action, *cf. Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434-40, 448 (1934), does not mean that a court — which is bound by the Due Process Clause — may do so. *Cf. Logan v. Zimmerman*, 455 U.S. 422, 427, 432-33 (1982). The constitutional right to notice and a chance to opt-out cannot be extinguished by mislabeling this class action as a mandatory *in rem* case.

The second issue common to this case and *Adams* is the narrower argument that due process prohibits a court from exercising personal jurisdiction over class members asserting claims for damages who lack minimum contacts with the forum state, unless they have an opportunity to opt out. *See Adams v. Robertson*, slip op. at 4-5, 8 n.6 (noting Court's "continuing interest" in this issue). As Judge Smith noted (App. 86a & n.16), on this issue the decision

below is in direct conflict with precedent in the Third and Ninth Circuits. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dism'd as improv. granted*, 511 U.S. 117 (1994); *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768-69 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

This case thus presents important questions that this Court was unable to reach in *Adams v. Robertson*. Because these issues were squarely presented to, and in fact ruled upon by, the federal court of appeals below, this case is an ideal vehicle for consideration of those questions in the wake of the dismissal in *Adams*. Therefore, the petition should be granted.

III. HOWEVER THIS COURT DECIDES *AMCHEM*, AND INDEPENDENT OF THE DUE PROCESS ISSUE ON WHICH THE COURT GRANTED REVIEW IN *ADAMS*, CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE FIFTH CIRCUIT'S RADICAL EXPANSION OF MANDATORY CLASSES UNDER RULE 23(b)(1)(B) VIOLATES THE RULES ENABLING ACT AND THE RULES OF DECISION ACT, AND ALLOWS CIRCUMVENTION OF RULE 23(b)(3) AND OF FEDERAL BANKRUPTCY LAW.

Because this case is a federal diversity jurisdiction class action brought pursuant to Fed.R.Civ.P. 23, there are a number of non-constitutional issues presented here that were absent from *Adams v. Robertson*, which was a state court class action in which the only federal question presented concerned the Due Process Clause. In the case at hand, principles of federalism and separation of powers, the Due Process Clause, the Rules Enabling Act, the Rules of Decision Act and Rule 23 itself all forbid mandatory class treatment of the individualized claims for damages alleged here.[9]

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[9] The due process component of this question was previously before this Court in *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994) (*per curiam*), in which this Court, dismissing certiorari as improvidently granted, indicated that there was "at least a substantial possibility" that, "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-

As noted above, both the district court and the court of appeals below conceded that the complaint alleges only personal causes of action for damages and that the damages remedies set forth in the prayer for relief are paradigmatic legal — rather than equitable — remedies. App.122a & nn. 54-56. Nor are the class members' individual claims for money damages remotely akin to suits for injunctive relief under the civil rights laws or other litigation in which classes have been certified pursuant to Rule 23(b)(1)(A) and Rule 23(b)(2). In those situations, the plaintiffs have an undivided common interest (usually in injunctive relief to compel the defendant to act appropriately with respect to the entire class) at the outset of the case, when the complaint is filed, *before* any settlement is imposed. Those plaintiffs' claims to relief are not predicated, as the supposedly *in rem* claims are in this case, on an assumption that the settlement has already been implemented and now creates the very basis for those common claims. The claims asserted here are, at most, eligible (at least theoretically) for class treatment only under Rule 23(b)(3) (*but see* the Third Circuit's decision in *Georgine v. Amchem Products*). Yet the possibility of mass opt-outs from the class would spoil the insurers' and Fibreboard's attempt to rid themselves of all future asbestos liability, as they candidly admitted during the settlement negotiations. App. 9a-15a. Therefore, the settling parties and the courts below have tried to shoehorn these *in personam* damages claims into a Rule 23(b)(1)(B) class on the theory that they are in fact *in rem* claims "made by numerous persons against a fund insufficient to satisfy all claims." Advisory Committee Note to 1966 Amendment to Rule 23(b)(1)(B).

But here there is no fund — limited or otherwise — to speak of:

> The insurance proceeds are not common or limited, but are simply all that the defendants are willing to provide to the settlement. A settlement offer is far from a "fixed asset ... in which all class members have a preexisting interest." ... Second, the plaintiffs do not have a preexisting interest in Fibreboard's assets; *the purpose of the suit is to establish those rights and not to divide preexisting rights.*

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out, and not under Rules 23(b)(1) and (b)(2), which do not." 114 S.Ct. at 1361.

App.86a-487a n.17 (Smith, J., dissenting)(emphasis added). When the district court admitted that the class "'claims were, prior to settlement, *in personam* in character,'" it was implying that, in its view, "the settlement transformed the claims into something other than *in personam* claims." App. 122a n.56 (Smith, J., dissenting)(quoting the district court). Thus, "[f]ar from adjudicating equitable rights in a preexisting fund, the settlement *creates* a common fund by extinguishing *personal* rights of action." App. 87a (emphasis in original).

The very purpose of the Global Settlement was to accomplish this reverse alchemy: to repeal the class members' existing common law *in personam* damage claims, which could not be brought within a non-opt-out Rule 23(b)(1)(B) class, and to replace them with *in rem* claims against a common, limited fund established by the settlement itself — claims that *could* be dragged into a mandatory class. Thus was gold turned to lead.

All of this was accomplished by the Fifth Circuit via the simple expedient of ignoring the actual *in personam* claims that the representative plaintiffs had to allege in order to confer jurisdiction on the district court, and fast-forwarding to the *in rem* claims against a limited common fund that were left *after* the settlement had been approved, and which were what the settling parties wanted to foist on the absent class members. The fund here was "limited" only by the bargaining powers of the insurance titans controlling this litigation. Rule 23(b)(1)(B) cannot be satisfied simply by the parties saying it is so. This blatant bootstrapping of a 23(b)(3) class into a 23(b)(1)(B) class is an astonishing example of the abuses possible if the federal courts are permitted to define and certify class actions exclusively by reference to a proposed settlement.

In this sense, the "limited fund" present here is akin to that present in *every* settlement. As Justice Souter observed in the *Amchem* oral argument, there is always "a kind of limited fund unless you assume that the defendants in these cases are simply standing in court saying, 'we'll pay anything they want — the sky is the limit.'" Tr.Oral Arg. in No. 96-270 at 14. Far from justifying Rule 23(b)(1)(B) treatment, the existence of these finite resources dooms the class action by creating inherently disabling intra-class structural conflicts.

Further, the Fifth Circuit's approval of class certification in this case works an enormous federal judicial usurpation of state legislative authority. In affirming the district court's certification of a "limited fund" class based on the settlement's creation of that very "fund," the Fifth Circuit ignored the federalism and separation of powers principles embodied in the Rules Enabling Act, 28 U.S.C. § 2072, and in the Rules of Decision Act, 28 U.S.C. § 1652.

Under the Rules of Decision Act, the class members' substantive rights in this diversity action are defined by "the laws of the several states." App. 526a. Under the Rules Enabling Act, the procedural rules promulgated by the federal courts cannot "abridge, enlarge or modify any substantive right." App. 525a. The application of Rule 23(b)(1)(B) to mass tort cases based on the potential future insolvency of the defendant abridges the substantive rights of class members by, as the Fifth Circuit candidly put it, "effect[ing] a pro-rata reduction of all claims." App.48a.

The substantive law does not permit such a pro-rata reduction with respect to *in personam* claims for damages against a defendant that is not in bankruptcy or receivership If petitioner Esteban Ortiz were to obtain a final judgment against Fibreboard for damages from his current asbestosis condition, state law would entitle him to execute that judgment against Fibreboard's assets as soon as the judgment became final, and no other member of this class could interfere with his collection of that judgment *in its entirety*. Outside of the bankruptcy context — which is a product of legislative, not judicial creation, and which is not present here — substantive tort law provides no relief for late-arriving claimants. Federal courts, however well intentioned, cannot use a rule of procedure to fashion such relief for public policy reasons.[10]

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[10]As one scholar has written with respect to a proposed revision of Rule 23:

> The settlement class action ought be seen as a substantive device comparable to bankruptcy. ... The bankruptcy laws of the United States are not made by rule of court, nor could they be. A moment's consideration of the problems of drafting a law to provide the desired alternative to bankruptcy reveals that many substantive entitlements are put at risk, while others are necessarily enlarged. This is not a task for judicial rulemakers. Those whose rights are affected are

Indeed, the Fifth Circuit's decision approving use of a mandatory class action under Rule 23(b)(1)(B) as a substitute for bankruptcy conflicts with the Second Circuit's decision in *Keene Corp. v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993). The Second Circuit rejected an effort by an insolvent asbestos defendant to impose a mandatory class action settlement upon future asbestos victims as a substitute for the substantive and procedural safeguards of bankruptcy. The Second Circuit emphasized that making pro rata adjustments of tort creditors' rights is not the appropriate role of the judiciary, even if the class action procedure might be "more efficient" than bankruptcy: "the function of federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." 14 F.3d at 733. The *Keene* court held that the asbestos defendant's attempted "evasion of the Bankruptcy Code" was impermissible because:

> [C]lass members in cases such as this would have no say in the conduct of the court-appointed class representatives and unlike creditors in bankruptcy, are not able to vote on a settlement. *See* 11 U.S.C. § 1126. For them, it would be "cram-down" from start to finish. Finally, unlike a lawyer for a creditors' committee, the class representatives in matters like the present one may not be compensated unless a settlement is reached, a situation fraught with danger to the rights of plaintiffs.

Id. at 732. Here, by contrast, the Fifth Circuit approved Fibreboard's legislative proposal to substitute a mandatory class action settlement for bankruptcy.

> entitled under the Constitution as well as the Rules Enabling Act to have such laws considered by duly elected representatives who are accountable to their constituencies.

See Memorandum from Duke Professor of Law Paul Carrington to the Standing Committee on Rules of the Judicial Conference of the United States, May 21, 1996, at 5. *See also* Paul D. Carrington & Derek Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Invalidity of Proposed Rule 23(b)(4)*, 38 ARIZ. L. REV. (forthcoming 1997).

To be sure, the nominal arrangement of the parties is superficially different. In *Keene*, the asbestos manufacturer sought to invoke the subject matter jurisdiction of a federal court as a purported plaintiff, in order to impose a class action settlement upon its tort victims as a defendant class. In this case, Fibreboard is listed as the defendant. But as Judge Smith pointed out, that difference reflects no more than the fact that Keene Corporation was more forthright than Fibreboard:

> Instead of retaining plaintiffs' counsel and having them file a complaint asserting claims they had no intention of pursuing (as occurred here), the asbestos manufacturer asked the court to oversee the negotiation of a settlement.

App. 74a. The conflict between the decision below and *Keene*, and the implications of that conflict for federalism and the separation of powers, constitute a compelling, independent ground for this Court to grant the petition.

CONCLUSION

This case presents several issues of sufficient importance that this Court has already granted certiorari in other cases to resolve them. In addition, this case presents the first instance in which any federal court has certified a mandatory, settlement-only class action to resolve future tort claims. As Judge Smith recognized, the outcome here will have a lasting impact on the legal rights of tort victims throughout the nation:

> Ever since the district court's certification order, ... corporate America has been "anxiously awaiting" a decision in this case. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims."

App. 67a. Thus, although the combination of legal issues presented here is unique, it will not remain so for long if this Court leaves the

Fifth Circuit's decision unreviewed. Nor will other courts of appeals have an opportunity to rule on these questions in other cases. For by their very nature, nationwide settlement class actions can be filed anywhere in the country, and this case enshrines the Fifth Circuit as the venue of choice for mass tort defendants seeking to resolve all of their future liabilities in a single stroke.

For all these reasons, the writ should issue.

Respectfully submitted,

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